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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1957

**No. 853**

FRANK W. BABCOCK,
*Appellant,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Appellee.*

## BRIEF IN OPPOSITION TO MOTION TO AFFIRM THE ORDER AND/OR DISMISS THE APPEAL HEREIN.

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### ARGUMENT.

### I.

#### THERE WAS NO STATE GROUND UPON WHICH THE DECISION OF THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT COULD HAVE RESTED.

Appellee contends that the judgment and order appealed from might have rested on either of two State grounds: (1) That the Federal question was not properly before the Court; or (2) That the Bay Area Air Pollution Control District law (California, *Health and Safety Code*, Division 20, Chapter 2.5;

Jurisdictional Statement, Appendix, pp. 25, et seq.) violated Article IV, Section 25 of the *California Constitution,* and was therefore void, thereby eliminating the discrimination complained of by appellant.

These contentions are unsound.

California's general rule that points not raised in the trial Court will not be considered on appeal is subject to the exception, expressed in *People v. Alvidrez,* 158 A.C.A. 317, at p. 319,

> ". . . that the court will consider fundamental errors or gross irregularity where the error is of such nature and so substantial that an objection [in the trial court] would not have obviated it . . ."

The constitutionality of a statute under which a defendant may be tried, convicted and imprisoned is obviously such a fundamental question.

> ". . . An unconstitutional statute goes to the very jurisdiction of the court, and hence may be attacked at any stage of the proceedings."
>
> *Alves v. Justice's Court,* 148 Cal. App. 2d 419 at page 425 (Petition for hearing in the California Supreme Court denied).

It may be noted also that appellee made no such contention before the Appellate Department of the Superior Court.

We do not concur with appellee's surmise that the Court below could or did decide that the Bay Area Air Pollution Control law was not permitted by *California Constitution,* Article IV, Section 25 in view

of *American River Flood Control District v. Sweet*, 214 Cal. 778, in which the Court upheld the statute there in question against a similar challenge, saying, in part:

> "First, the general law is permissive only. The initiation of proceedings for the formation of such districts under general law must depend on the voluntary petition of landowners in the district. The landowners in the district might never file, or might indefinitely delay the filing of such a petition. Here the district is created by the special act. It has no alternative but to function and carry out the purposes of the act. . . ."

Similarly, in the case at bar, similar considerations existed for the passage of the act. In the report of the Assembly Interim Committee, Volume XIII, No. 4, submitted to the Assembly under date of March 4, 1955, page 40, it was stated that:

> "The statements of representatives from counties seriously considering the activation of air pollution control districts under present legislation at the sub-committee's formal hearing and at the various conferences support the following conclusions:
>
> 1. The smog problem is basin-wide and requires a basin-wide organization.
>
> 2. Present legislation makes possible the creation of such a district but is impracticable for the nine counties of the Bay Area and its use highly improbable.
>
> 3. Counties therefore are delaying activation under the existing legislation, awaiting realistic

amendments that would make the act useful to the region."

The legislative finding in the Bay Area Air Pollution Control law that: ". . . Since the problem requiring this legislation is local and special due to atmospheric and geographical conditions, a general law cannot be made applicable so as to insure its effective alleviation. It is necessary, therefore, to create by special law, an air pollution control district which includes only that area within the boundaries of . . . [nine named counties] seems to show that the legislature was conscious of its constitutional limitations, and intended, by the finding, to take the statute out of the Thirty-Third subdivision of Article IV, Section 25 of the California Constitution, prohibiting the passage of local or special laws: ". . . In all other cases where a general law can be made applicable.", and to bring the statute within the doctrine of the *American River Flood Control District* case, supra, p. 2.

We do not think it likely that the Court would or that it did invalidate the whole scheme of air pollution control for nine California counties merely to uphold the penal provisions of the statute governing five other counties, but rather that it thought that a valid classification had been made sufficient to justify the discrimination.

Indeed, were California here represented by her Attorney General, rather than by the City Attorney of the City of Los Angeles, we do not suppose that a contention of such a parochial nature would have been made.

The plain fact is that the Federal question was the only question argued to the Court below and decided by it.

*Stembridge v. Georgia*, 343 U.S. 541, 72 S.Ct. 834, 96 L.ed. 1130 is not in point since there the highest Court of the State had not been requested to rule on the question after amendment of the record in the intermediate Court to show that the Federal question had been dealt with.

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## II.

### THE DECISION OF THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IS NOT CORRECT.

No attack has been made or will be made upon the power of the legislature to deal with air pollution. Nor do we quarrel with the principle that valid classification can justify discrimination between classes. Nor do we quarrel with the general language in appellee's Argument in support of her motion which has been paraphrased from *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.ed. 563; *West Coast Hotel v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.ed. 703; *Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct. 198, 93 L.ed. 163, or *Dominion Hotel v. State of Arizona*, 249 U.S. 265, 39 S.Ct. 273, 63 L.ed. 597.

We do maintain, however, that there is no room for surmise or speculation in this case; that we know what the legislature did, and for what reason. That the only reasons for the adoption of a separate statute were (1) to provide for the establishment and financial support of a workable administrative unit for

the nine Bay Area counties, and (2) to make the establishment of the district in six of the nine counties mandatory rather than permissive.

In such posture, to attempt to sustain the discrimination between persons committing identical acts, or owning identical equipment, or conducting identical operations, one in the Los Angeles District, and the other in the Bay Area District, on the conjecture that the legislature might have believed that evils in the same field were of different dimensions and proportions, or that different degrees of harm were involved, or that the two situations were different in fact or opinion, or that local conditions which the Court could not know justify the classification is to close one's eyes to the record which clearly shows what the legislature was trying to do, and did do, leaving no room for conjecture or surmise.

Except for the generalities above mentioned, and appellee's flat conclusion that ". . . the legislature could find that criminal punishment was unnecessary" (Motion, p. 6) appellee has not suggested any possible basis of classification between people, equipment or processes in the area subject to the separate acts.

Without some such suggestion it has been said that the Court has "no right to conjure up possible situations which might justify the discrimination . . .".

*Mayflower Farms v. Ten Eyck,* 297 U.S. 266, 274, 56 S.Ct. 457, 80 L.ed. 675.

And, even if some such suggestion should be made, to the effect that existing characteristics of people, equipment or processes in the Bay Area make the

imposition of criminal sanctions unnecessary, yet these characteristics, under continuing regulation, may change, removing what factual basis there might conceivably have been for the classification. This has been held to be a factor tending to invalidate a discriminatory law.

*Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344, 1351, 1 L.ed. 2d 1485.

*Ocampo v. United States,* 234 U.S. 291, 34 S.Ct. 712, 58 L.ed. 1231, and *Salsbury v. Maryland,* 346 U.S. 545, 74 S.Ct. 280, 98 L.ed. 281, cited by appellee for the proposition that the constitutional guarantee of equal protection of the laws does not require territorial uniformity rest rather upon the ground that legislatures have a very wide discretion to prescribe mere matters of procedure.

We feel that the case at bar is governed by *Smith v. Cahoon,* 283 U.S. 553, 57 S.Ct. 582, 75 L.ed. 1264, and by *Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344, 1 L.ed. 2d 1485, that the Federal question is substantial and was properly before and was decided by the Court from which this appeal was taken and that appellee's motion to affirm the order and/or dismiss this appeal should be denied.

Dated, Woodside, California,
April 22, 1958.

Respectfully submitted,
AUSTIN CLAPP,
*Attorney for Appellant.*